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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	

MOTION FOR ACCEPTANCE OF LATE FILED COMMENTS

The Caribbean Satellite Network, Inc. ("CSN"), by its attorney, hereby moves the Commission to accept its Comments in the above-captioned proceeding two days late.

Due to difficulties in coordinating the filing of the comments from counsel's Florida office, the filing of these comments was unfortunately delayed by two days. This minor delay will not affect the Commission nor prejudice any other party in this proceeding, as the Commission will still be processing the numerous other comments being filed in this proceeding, and interested parties will have until February 16, 1993 to review these comments and respond to them in reply comments.

Respectfully submitted,

David Honig

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January 27, 1993

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 1993, the foregoing "MOTION FOR ACCEPTANCE OF LATE FILED COMMENTS" was hand delivered to:

The Honorable Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

The Honorable James H. Quello, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 802
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The Honorable Andrew C. Barrett, Commissioner
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The Honorable Sherrie P. Marshall, Commissioner
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The Honorable Ervin S. Duggan, Commissioner
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David Honig

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Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
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COMMENTS OF THE CARIBBEAN SATELLITE NETWORK, INC. ON PROGRAM CARRIAGE AGREEMENT ISSUES

The Caribbean Satellite Network, Inc. ("CSN"), in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding (released December 24, 1992), hereby files its comments concerning regulations to implement the program carriage agreement provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act").

I. CSN'S INTEREST IN THIS PROCEEDING

CSN is the first and only minority-owned satellite-delivered cable programming service to distribute programming which focusses on the rich heritage and culture of the Caribbean. CSN launched its programming network on December 1, 1992 and intends to provide programming to cable systems throughout the United States 24 hours per day, seven days per week. It is the first and only video vehicle through which Caribbean and non-Caribbean residents in the United States can share in the rich heritage and culture of the English, Spanish, French and Dutch speaking countries of the Caribbean.[1/]

[1/] The United States Census for 1990 lists the number of Caribbean residents within the United States at just under two million.

As a brand new minority-owned cable programming network offering diverse and unique programming, CSN is deeply concerned with the instant rulemaking proceeding relating to program carriage issues.

II. PROGRAM CARRIAGE ISSUES

Section 616(a)(1) of the Cable Act provides that the Commission must adopt rules "to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems."

Section 626(a)(2) of the Act directs the Commission to adopt rules "to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system."

Further, Section 616(a)(3) provides that the new rules must "prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."

The NPRM seeks comment on how best to implement these provisions.

In adopting the instant NPRM, the Commission has correctly concluded that the current cable marketplace lends itself to an uneven playing field. Several cable operators have huge numbers of subscribers, without which a new cable programming network like CSN is very often doomed. Cable operators are well aware of this fact, and can therefore exercise enormous leverage to extort otherwise commercially unreasonable concessions, such as requiring a financial interest in the programming entity as a condition of carriage. This is an extremely important and crucial issue to programming networks, particularly start up networks like CSN, which are faced with the daunting possibility of conceding a financial interest in their company in order to be carried on a cable system.

When programming networks are forced to hand over ownership interests to cable operators, two results obtain. First, to the extent that major cable system operators acquire ownership interests and influence in numerous cable networks, diversity of programming is reduced. Second, to the extent that programming networks are forced unfairly to relinquish financial interests in their ventures, the reduced profitability of creating a cable network will discourage entry by others into cable programming as well as discourage the creation of new networks.

While CSN strongly feels that these detrimental results must be prevented, it is virtually impossible to adopt a precise "one size fits all" standard for determining whether coercion is present or whether a cable operator has discriminated in video programming distribution on the basis of affiliation or non-affiliation with a programming network. The NPRM necessarily addresses these issues because a cable operator may otherwise negotiate more favorable terms with a programming network with which the cable operator has an interest, or refuse to carry an unaffiliated network altogether, thereby leaving unaffiliated networks at a competitive disadvantage.

Unfortunately, there will rarely be a situation where an aggrieved cable programmer can present the Commission with documentation directly evidencing coercion or discrimination by a cable operator with respect to cable carriage. Short of a very obvious case (such as a cable operator that airs only affiliated networks), the Commission will have to examine numerous factors.[2] Accordingly, CSN proposes that the Commission examine the totality of the circumstances in determining whether a cable operator has demanded that a programming vendor provide it with a financial interest as a condition of carriage. Such an ad hoc approach will assure fairness and minimize the opportunity for cable operators to evade the rules by merely observing the letter (though not the spirit) of a specific standard established by the Commission.

More specifically, CSN proposes that the Commission, in reviewing the relative bargaining positions of each entity, scrutinize the affiliation arrangements that cable operators have with existing programming networks to determine whether affiliated programming networks are placed in a better position than unaffiliated programming networks.

Very seldom will a programming network complain that a cable operator discriminated against it because the network would not concede a financial interest. The industry is a small one in which

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[2] In determining whether a party's claims of integrated ownership are genuine, the Commission has articulated several factors which when taken together may be dispositive. See e.g. In re Kist Corp., 99 FCC 2d (1984). Similarly, the Commission can define whether a cable operator has coerced a programming vendor by using a similar multi-factor analysis.

everyone knows one another. In the cable business, grudges developed today evolve into scores to be settled tomorrow. Thus, no rational programming network would resort to litigation at the FCC except as a last resort.

Consequently, the Commission should view a well drawn complaint as inherently serious. Recognizing that the complainant will lack access to the internal files of the cable operator, the Commission should promptly initiate its own investigation. See Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978) ("Bilingual").

In reviewing a programming network's complaint, the cable operator's response thereto, and the fruits of its Bilingual investigation, the Commission should view the following factors, *inter alia*, as indications that the normal operation of the marketplace has been skewed and that relief is needed to protect free competition:

1. Affiliated networks were carried after significantly less delay than obtained for the carriage of nonaffiliated networks;

2. Affiliated networks were placed on more systems, and placed there more rapidly, than were nonaffiliated networks;

3. Affiliated networks were carried on more attractive financial terms, including service rates and commercial availabilities, than were nonaffiliated networks;

4. Affiliated networks were provided with carriage for longer time periods than were nonaffiliated networks.

5. Affiliated networks received more attractive channel placements than nonaffiliated networks;

6. Negotiations between the cable operator and the complainant stalled after the complainant refused to offer a financial interest to the cable operator, or the cable operator openly suggested that a financial interest would make the affiliation process easier

for the complainant or would be a prerequisite for affiliation.

This kind of comparative evidence must be developed because sophisticated cable operators may be expected to carefully conceal overt evidence of an intent to discriminate against nonaffiliated networks. Before the passage of the Cable Act, a cable operator could openly require a programming network to provide a financial interest in exchange for carriage. Now, such a cable operator will likely say nothing, while simply taking no action on the programming network's request for carriage until the programming network suggests that a financial interest might speed up the process. There is likely to evolve a carefully coded commercial language by which the cable operator may immunize itself from liability under the Cable Act by never initiating discussions of financial interests. In this way, the cable operator will enable itself to claim that the idea of affiliation supposedly originated with the programming network. A sophisticated cable operator may thereby completely frustrate the intent of Congress as expressed in the Cable Act.[3/]

If the evidence indicates that programming networks with which cable operators have a financial interest are given preferential treatment over independent programming networks, the Commission

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3/ Unlike race discrimination in employment or housing, the presence of a financial interest is not an immutable characteristic. Thus, a closer analogy to the anticipated behavior of a cable operator is that found among employers wishing to hire only women willing to engage in sexual relationships. To frustrate the intent of the EEOC in regulating sexual harassment, employers commonly stop discussing a potential job until a woman, supposedly voluntarily, initiates sexual interest. Thereafter the discussions suddenly conclude in an offer of employment. This type of gambit frequently immunizes the employer from liability by providing the defense that the sexual activity was the woman's idea.

should find that a prima facie case of discrimination has been made. Such a conclusion must prompt the Commission to hold a hearing, placing at issue, inter alia, all Commission rights, authorizations and privileges, including CARS licenses, held by the cable operator. Long experience in other areas in which Commission licensees have market dominance over complainants, such as EEO, has demonstrated that without the possibility of a hearing, marketplace-skewing, commercially unreasonable behavior will continue unchecked and unremedied.

III. THE COMMISSION SHOULD ADOPT RULES CONSISTENT WITH CONGRESSIONAL POLICIES

Section 2(a)(6) of the Cable Act specifically provides that "there is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." In addition, Section 2(b)(1) states that it is the policy of the Congress to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." Further, Section 2(b)(5) provides that the underlying Congressional policy is to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."

The Commission is under an obligation to adopt rules that are consistent with these underlying policies mandated by Congress. In today's multi-ethnic society where informational diversity is critical, start up programming networks like CSN are vital to accomplishing these goals. These entities provide an additional voice to the marketplace of ideas, and give voices to groups that have not previously been heard.

In adopting rules consistent with these underlying Congressional policies, the Commission must place diversity of programming at the forefront and ensure that cable operators do not have undue market power vis-a-vis video programmers. The David and Goliath syndrome which currently permeates the cable marketplace inhibits diversity by increasing the barriers to successful entry by programming networks, particularly start-up minority-owned programming networks like CSN.

IV. THE ACQUISITION OF A FINANCIAL INTEREST BY A CABLE OPERATOR IN A MINORITY OWNED PROGRAMMING NETWORK IMPEDES THE COMMISSION'S MINORITY OWNERSHIP POLICY

It is well settled that the public interest is enhanced when available programming reflects a diversity of viewpoints, including the viewpoints of racial and ethnic minority groups.[4/] Moreover, the Commission has stated that "adequate representation of minority views in cable television programming enhances the goal of diversified programming which is an objective of both the Communications Act of 1934 and of the First Amendment."[5/]

A cable operator's ability to use its enormous leverage to extract a financial interest in a minority owned programming network undermines the Commission's minority ownership policies. The Commission's commitment to encouraging minority participation in the field of communications is a continuing one. As such, CSN urges the Commission to adopt rules in this proceeding that will protect programmers, particularly minority-controlled programmers from dilution of their interests by coercive cable operators.

4/ See e.g., NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976).

5/ See, Policy Statement on Minority Ownership of Cable Television Facilities, 52 RR 2d 1469 (1982).

V. PROCEDURES FOR THE REVIEW OF COMPLAINTS

Section 616(a)(4) provides for expedited review of any complaints made by a video programming vendor pursuant to that section. Denial of carriage on a major cable operator's system can destroy a new programming network unless redressed immediately. Accordingly, CSN urges the Commission to adopt injunctive type relief with immediate discovery and hearing rights similar to that created by the Commission for enforcement of its political broadcasting rules.[6] In addition, the Commission should award reasonable attorneys' fees and money damages.

CSN urges that the complaint, Bilingual investigation and hearing process occur on a highly expedited basis, with intermediate injunctive relief available within 30 days while the investigatory process is continuing. Cable programming networks are daunting to startup and finance. Since the adoption of the Cable Act, CSN is the only such network which has succeeded in going onto a satellite. Without expeditious relief, the commercially unreasonable refusal of even one major MSO can kill a programming network, rendering its complaint moot.

The most important element of injunctive relief is the immediate carriage of the programmer on the cable operator's systems. CSN urges the Commission to adopt rules which provide for immediate mandatory carriage. Moreover, injunctive relief and Commission supervision must continue in effect following the issuance of a permanent order so as to prevent retaliatory conduct on the part of a cable operator against program vendors that challenge the cable

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[6] See e.g., In re Lawton Chiles et al., 7 FCC Rcd 6661 (MMB 1992).

operator's coercive practices. By providing immediate redress to aggrieved program vendors, the Commission can minimize the harm to both the public and the program vendors caused by coercive practices on the part of large cable operators.

CONCLUSION

CSN believes the Commission should adopt the approach outlined herein in crafting rules pertaining to program carriage. By doing so, the Commission can protect cable diversity, ensure fair competition, and adhere to the well established Congressional policies relating to the promotion of diversity and minority ownership.

Respectfully submitted,

CARIBBEAN SATELLITE NETWORK, INC.

By: David Honig

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January 27, 1993

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